Supreme Court, U.S.
FILED
DEC 22 1994
OFFICE OF THE CLERK

(2)

No. 94-946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FOREST GROVE, INC., *et al.*,

Petitioners,

v.

RTC MORTGAGE TRUST 1994 - S5,
successor in interest to the
Resolution Trust Corporation
as Receiver for
Hill Financial Savings Association,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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Balmar Legal Publishing Services, Washington, DC (202) 682-9800

16 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court should consider a case asking that the Court of Appeals for the Third Circuit apply state law when a) the Court of Appeals' decision was based on state law, and b) the parties conceded that the result was the same under either state law or federal common law?

2. Whether the Supreme Court should consider what remedy should be afforded one of the Petitioners when that issue will be decided for the first time by the district court on remand?

3. Whether the grounds and procedure for setting aside a judgment under Rule 60(b) in an action based on federal question jurisdiction are governed by federal law?

RULE 29.1 STATEMENT

The Resolution Trust Corporation ("RTC"), was established as a mixed ownership government corporation. The RTC is deemed to be an agency of the United States for purposes of subchapter II of chapter 5 and chapter 7 of title 5 of the United States Code when it is acting as a corporation. The RTC, when it is acting as a conservator or receiver of an insured depository institution, is deemed to be an agency of the United States to the same extent as the Federal Deposit Insurance Corporation ("FDIC") when the FDIC is acting as a conservator or receiver of an insured institution. With respect to this matter, the RTC was acting as receiver of Hill Financial Savings Association, an insured depository institution. The RTC has no parent or subsidiary corporations.

RTC, as receiver or conservator of various financial institutions, delivered certain assets from those institutions, including the assets at issue in this case, into RTC Mortgage Trust 1994 - S5, a Delaware business trust ("RTC Trust"). RTC Trust then sold securities evidencing ownership interests in the Trust. RTC Trust delivered the sale proceeds, as well as certain subordinate securities, to the RTC as payment for the assets transferred to RTC Trust. RTC Trust has no parent or subsidiary organizations other than as described above.

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RULE INVOLVED

Rule 60. Relief From Judgment or Order.

(b) *Mistakes: Inadvertence: Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent RTC Mortgage Trust 1994 - S5, successor in interest to Resolution Trust Corporation ("RTC") as Receiver for Hill Financial Savings Association ("Hill Financial"),[1] opposes the petition of Forest Grove, Inc., Ron Isenhart, and Delores A. Isenhart (collectively, "Petitioners") for a writ of certiorari (the "Petition"). Because the decision of the Third

[1] As explained in the foregoing Rule 29.1 Statement and in RTC's motion for substitution of parties, this asset was conveyed by RTC to RTC Mortgage Trust 1994 - S5, a Delaware business trust. To avoid confusion, RTC Mortgage Trust 1994 - S5 will be referred to in this brief as "RTC".

Circuit was correctly decided upon state law, a writ of certiorari should not issue.

I. COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case, while accurately depicting the procedural history of the case, recites factual matters rejected by both the district court and the court of appeals and, perhaps more importantly, misstates the ruling of the Third Circuit, from which this review is sought. Therefore, RTC offers this Counterstatement of the Case.

Hill Financial is a failed thrift, which, since October 12, 1989, has been in RTC receivership. App. at 10a.[2] In 1986, Petitioner Forest Grove, Inc. ("Forest Grove"), sought a loan of $1,815,000.00 from Hill Financial to finance the construction of a mobile home park. App. at 5a. Hill Financial eventually approved the loan and advanced $1,210,000.00 to Forest Grove before ceasing advances under the loan.

Under the terms of Hill Financial's commitment letter to Forest Grove (the "Commitment Letter"), Petitioners Ronald Isenhart and Delores Isenhart (respectively, "Mr. and Mrs. Isenhart") were required to guarantee the loan and to execute documents including, *inter alia*, confessions of judgments. Forest Grove also executed a confession of judgment. While Mr. Isenhart executed his own confession of judgment, Mrs. Isenhart's agreement was executed by Mr. Isenhart under the authority of a "General Power of Attorney" signed by Mrs. Isenhart on the same day. *See* App. at 6a-9a.

Forest Grove failed to make the monthly payments due under the loan in 1989, and on February 2, 1990, RTC declared the loan in default. On November 20, 1992, RTC filed a complaint in the United States District Court for the Eastern District of Pennsylvania to confess judgment against the Peti-

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[2] Citations to "App." refer to the Petitioners' Appendix.

tioners. The district court entered judgment by confession against the Petitioners on November 25, 1992. App. at 10a.

On January 12, 1993, Petitioners filed a motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, seeking relief from the confession of judgment against them. The district court denied the motion, and Petitioners' appealed to the United States Court of Appeals for the Third Circuit. App. at 11a. The Third Circuit ultimately affirmed the district court as to Forest Grove and Mr. Isenhart. With respect to Mrs. Isenhart, the court of appeals reversed the district court's order refusing to open the judgment against her and remanded the case to the district court for further proceedings consistent with the court of appeals' opinion. App. at 26a.

II. SUMMARY OF THE ARGUMENT

Contrary to Petitioners' statements, the Third Circuit did not decide this appeal under federal common law. In fact, the Third Circuit expressly declined to decide on that basis. After Petitioners *conceded* that the result would be the same under Pennsylvania law and federal common law — a concession with which the Third Circuit explicitly concurred — the court of appeals based its affirmance as to Forest Grove and Mr. Isenhart entirely on Pennsylvania law.

Mrs. Isenhart, although prevailing on her appeal, complains that the judgment against her should be "stricken" and not "opened." This result, she argues, also is compelled by Pennsylvania law. The court of appeals did not reach this issue, and the relief to be accorded Mrs. Isenhart must be determined by the district court on remand. In all events, the relief available under Rule 60(b) is governed entirely by federal law.

III. REASONS FOR DENYING THE WRIT

A. The issues raised by the Petitioners are not presented by the record in this case

1. The Petitioners conceded in the court of appeals that the choice of laws issue raised in the Petition is immaterial.

The Petition is dedicated to the argument that, following *O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 114 S. Ct. 2048 (1994), the court of appeals should have held that Pennsylvania law, rather than the Federal Rules of Civil Procedure, should govern Petitioners' Rule 60(b) motion. Irrespective of the merits of this argument in the abstract, Petitioners' argument is not presented by the record in this case. The Third Circuit explicitly did not reach the issue of which law to apply, stating instead that:

> there are two reasons why it is unnecessary for us to reach that legal question here. First, *both parties concede* that the result is the same under either Pennsylvania or federal common law and the district court relied alternately on Pennsylvania and federal law in concluding that the Isenharts' and Forest Grove's defense of failure of consideration was not meritorious.

App. 18a-19a (emphasis added). The court of appeals then emphasized this point, by stating, "We once again conclude that the question of applicable law is immaterial." App. 20a n.5.

Thus, not only did the court of appeals fail to reach the issue presented by the Petition, it avoided that issue because the Petitioners conceded that the choice of law issue was not material. Having conceded that the result is the same under both federal common law and Pennsylvania law, Petitioners should not be allowed to withdraw that concession and argue that (1) the issue should have been reached by the court of appeals and (2) the resolution of the issue was outcome determinative.

2. The court of appeals relied solely on state law and evidentiary rulings to affirm the district court's decision.

After noting the conceded lack of relevance in choosing between Pennsylvania law and federal common law to decide the issues on appeal, the Third Circuit rested its affirmance solely on Pennsylvania law. The court of appeals reviewed both the language of the Commitment Letter and the evidence presented to the district court. Based on this review, the Third Circuit found both as a factual and a legal matter that the Petitioners' failure of consideration defense was insufficient to avoid the confessed judgment against them. Having so concluded, the court of appeals declared:

> Because we decide [Petitioners'] claim on this ground, we do not reach the question of whether the district court correctly held that *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) precluded them from asserting a lack of consideration as a defense to the confession of judgment.

App. at 22a n.6.

The decision of the Third Circuit, therefore, was grounded uniquely on the facts of this case as they related to Pennsylvania law. Before analyzing Petitioners' arguments, the court of appeals noted its agreement with the parties' concession that "the question of applicable law is immaterial." App. at 20a n.5. Citing cases solely from the Pennsylvania state courts to describe the defense of failure of consideration, the court of appeals found the requisite consideration in the defunct thrift's "promise to lend money to Forest Grove, a corporation the Isenharts owned . . . ." App. at 21a (citing *Miners' State Bank v. Auksztokalnis*, 128 A. 726, 728 (Pa. 1925)).

To summarize, the Third Circuit did not reject Pennsylvania state law in favor of federal common law to decide this

appeal. If anything, the opposite is closer to the truth. The court of appeals, agreeing with Petitioners' concession that the choice was irrelevant, grounded its decision solely on Pennsylvania law. Petitioners' dissatisfaction, therefore, is not with the Third Circuit's choice of law, but rather with its interpretation of Pennsylvania law. That dispute, however, does not merit review by writ of certiorari, and the Petitioners' failure to address the issue accurately in the Petition reflects their concurrence with that assessment.

B. Mrs. Isenhart's separate argument is both meritless and premature.

Mrs. Isenhart, who prevailed in the Third Circuit, also seeks review by certiorari, contending that the confessed judgment against her should, according to Pennsylvania law, be stricken *ab initio*, rather than opened. This argument is predicated on both a misconception of the applicable law and a misreading of the Third Circuit's ruling. As shown below, the nature of the remedy afforded by Rule 60(b) is entirely a creature of federal law. More importantly, perhaps, no court has yet decided what remedy will be afforded to Mrs. Isenhart.

1. The court of appeals correctly held that federal law determines the grounds for setting aside a judgment.

Rule 60(b) sets forth the bases upon which a district court can grant relief from a judgment. Since 1965, this Court has held that matters covered by the Federal Rules of Civil Procedure are governed by those rules. See, *Hanna v. Plumer*, 380 U.S. 460, 471, 85 S. Ct. 1136, 1144 (1965) ("When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule"). "The grounds and procedure for setting aside a federal judgment are entirely a matter of federal law, on which state law may be disregarded." Wright, Miller & Cooper, Federal Practice and

Procedure: Jurisdiction § 2853. In holding the Federal Rules apply in determining whether to open or strike a confessed judgment, the court of appeals followed the precedent of this Court.

2. The court of appeals did not decide what remedy will be available to Mrs. Isenhart.

The Third Circuit did not declare that the confessed judgment against Mrs. Isenhart would be "opened," or "striken." The court of appeals agreed with Mrs. Isenhart that the confessed judgment was taken improperly and ordered that

> [t]he district court's order refusing to open the judgment confessed against Mrs. Isenhart will be reversed and the case will be remanded to the district court for further proceedings consistent with this opinion.

App. at 26a. Thus, the remedy to be afforded Mrs. Isenhart will be determined by the district court on remand in a manner "consistent with the [Third Circuit's] opinion." Because the distinction now argued by Mrs. Isenhart is not even addressed in the Third Circuit's opinion, the remedy to be afforded will be considered for the first time by the district court on remand. Review by this Court at this time, therefore, is premature and improvident.

C. No conflict exists in the circuits on the issue presented by this Petition.

The Petition incorrectly asserts that the decision of the Third Circuit conflicts with "every other Circuit Court to address the issue." Pet. at 8. Petitioners lists four cases citing *O'Melveny & Myers* for the proposition that state rules of decision normally should be controlling on issues asserted by the RTC and the FDIC and relating to the merits of causes of action created by state law. As already shown above, the Third Circuit followed Pennsylvania law to decide the claims of Forest

Grove and Mr. Isenhart. Consequently, the *O'Melveny & Myers* issue was not decided against these Petitioners.

Neither do the cases cited by Petitioners conflict with the Third Circuit's disposition of Mrs. Isenhart's claim. If the issue of the remedy to be afforded Mrs. Isenhart is reached, the cases offered by Petitioners do not conflict with the proposition that federal law is controlling. In fact, not one of these cases involves the interpretation and application of the Federal Rules of Civil Procedure. *See, Resolution Trust Corporation v. Maplewood Investments*, 31 F.3d 1276 (4th Cir. 1994) (holding that, under *O'Melveny & Myers*, Virginia law is followed to determine whether a holder can be a holder in due course of a nonnegotiable note); *Federal Deposit Insurance Corp. v. Massingill*, 30 F.3d 601 (5th Cir. 1994) (state law followed to determine whether co-maker of note may assert impairment of collateral defense);[3] *Federal Deposit Insurance Corp. v. Oldenburg*, 34 F.3d 1529 (10th Cir. 1994) (state law followed to determine liability on fidelity bond for losses allegedly caused by fraud and breach of contract by former officers and directors); *Resolution Trust Corp. v. Artley*, 28 F.3d 1099 (11th Cir. 1994) (state law determines whether adverse domination may be used to toll state statute of limitations applicable to state law claims of negligence and breach of contract).

Not only does the Third Circuit's opinion not conflict with the other circuits, all of the courts of appeals agree that the

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[3] Although *Massingill* is irrelevant to the rules of decision to be applied in interpreting and implementing the Federal Rules of Civil Procedure, that case is relevant to the Petition in another manner. *Massingill* was written in response to a petition for rehearing. The defendant in *Massingill* failed to brief and argue in the issue of whether state law or federal law controlled in his original appeal, and, ultimately the court of appeals refused to "entertain those thorny questions presented for the first time in appell[ant's] petition for rehearing." 30 F.3d at 605 (quoting *Holley v. Seminole County School Dist.*, 763 F.2d 399, 401 (5th Cir. 1985)). Likewise, because Petitioners conceded the irrelevancy of this point in the court of appeals, the issue should not be considered now.

grounds and procedure for setting aside a federal judgment is a matter of federal law. *See*, e.g. *Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983); *Johnson Chem. Co. v. Condado Center, Inc.*, 453 F.2d 1044 (1st Cir. 1972); *Vassos v. Societa Trans-Oceanica Canopus, S.A.*, 272 F.2d 182 (2nd Cir. 1959), *cert. denied*, 363 U.S. 935. 80 S.Ct. 756 (1959). Thus, on the issue presented by Petitioners, no conflict exists among the circuits or with any previous decision of this Court.

IV. CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit Should be denied.

Respectfully submitted,

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